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(c) Termination pursuant to §§ 124.303 and 124.304;

(d) Denials of requests to issue a waiver pursuant to § 124.515; and

(e) Suspensions pursuant to § 124.305(a).

§ 134.402 Appeal petition.

In addition to the requirements of § 134.203, an appeal petition must state, with specific reference to the determination and the record supporting such determination, the reasons why the determination is alleged to be arbitrary, capricious or contrary to law.

§ 134.403 Service of appeal petition.

(a) Concurrent with its filing with OHA, a concern must also serve SBA's AA/8(a)BD and the appropriate Associate General Counsel in SBA's Office of General Counsel with a copy of the petition, including attachments.

(1) For appeals relating to denials of program admission pursuant to § 124.206 of this title, suspensions of program assistance pursuant to § 124.305, or denials of requests for waivers pursuant to § 124.515, a petitioner must serve the SBA's Associate General Counsel for General Law.

(2) For appeals relating to early graduation pursuant to §§ 124.302 and 124.304 or termination pursuant to §§ 124.303 and 124.304, a petitioner must serve the SBA's Associate General Counsel for Litigation.

(3) Service on SBA's Office of General Counsel generally or the SBA General Counsel do not meet the service requirements of this section.

(b) Service should be addressed to the AA/8(a)BD and the applicable Associate General Counsel at the Small Business Administration, 409 3rd Street, SW, Washington, DC 20416.

§ 134.404 Decision by Administrative Law Judge.

Appeal proceedings brought under this subpart will be conducted by an Administrative Law Judge.

§ 134.405 Jurisdiction.

(a) The Administrative Law Judge selected to preside over an appeal shall decline to accept jurisdiction over any matter if:

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(1) The appeal does not, on its face, allege facts that, if proven to be true, would warrant reversal or modification of the determination, including appeals of denials of 8(a) BD program admission based in whole or in part on grounds other than a negative finding of social disadvantage, economic disadvantage, ownership or control;

(2) The appeal is untimely filed under § 134.202 or is not otherwise filed in accordance with the requirements of this subpart or the requirements in subparts A and B of this part; or

(3) The matter has been decided or is the subject of an adjudication before a court of competent jurisdiction over such matters.

(b) Once the Administrative Law Judge accepts jurisdiction over an appeal, subsequent initiation of an adjudication of the matter by a court of competent jurisdiction will not preclude the Administrative Law Judge from rendering a final decision on the matter.

(c) Jurisdiction of the Administrative Law Judge in a suspension case is limited to the issue of whether the protection of the Government's interest requires suspension pending resolution of the termination action, unless the Administrative Law Judge has consolidated the suspension appeal with the corresponding termination appeal.

§ 134.406 Review of the administrative record.

(a) Except as provided in § 134.407, any proceeding conducted under this subpart shall be decided solely on a review of the written administrative record.

(b) The Administrative Law Judge's review is limited to determining whether the Agency's determination is arbitrary, capricious, or contrary to law. As long as the Agency's determination is reasonable, the Administrative Law Judge must uphold it on appeal.

(c) The administrative record must contain all documents that are relevant to the determination on appeal before the Administrative Law Judge and upon which the SBA decision-maker relied. The administrative record, however, need not contain all

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documents pertaining to the petitioner. For example, the administrative record in a termination proceeding need not include the Participant's entire business plan file, documents pertaining to specific 8(a) contracts, or the firm's application for participation in the 8(a) BD program if they are unrelated to the termination action. The petitioner may object to the absence of a document, previously submitted to or sent by SBA, which the petitioner believes was erroneously omitted from the administrative record.

(d) Where the Agency files its answer to the appeal petition after the date specified in §134.206, the Administrative Law Judge may decline to consider the answer and base his or her decision solely on a review of the administrative record.

(e) The Administrative Law Judge may remand a case to the AA/8(a)BD (or, in the case of a denial of a request for waiver under §124.515 of this title, to the Administrator) for further consideration if he or she determines that, due to the absence in the written administrative record of the reasons upon which the determination was based, the administrative record is insufficiently complete to decide whether the determination is arbitrary, capricious or contrary to law, or where it is clearly apparent from the record that SBA made an erroneous factual finding (e.g., SBA double counted an asset of an individual claiming disadvantaged status) or a mistake of law (e.g., SBA applied the wrong regulatory provision in evaluating the case). Such a remand will be for a period of 10 working days.

§ 134.407 Evidence beyond the record and discovery.

(a) The Administrative Law Judge may not admit evidence beyond the written administrative record nor permit any form of discovery unless he or she first determines that the petitioner, upon written submission, has made a substantial showing, based on credible evidence and not mere allegation, that the Agency determination in question may have resulted from bad faith or improper behavior.

(1) Prior to any such determination, the Administrative Law Judge must permit SBA to respond in writing to

any allegations of bad faith or improper behavior.

(2) Upon a determination by the Administrative Law Judge that the petitioner has made such a substantial showing, the Administrative Law Judge may permit appropriate discovery, and accept relevant evidence beyond the written administrative record, which is specifically limited to the alleged bad faith or improper behavior.

(b) A determination by the Administrative Law Judge that the required showing set forth in paragraph (a) of this section has been made does not shift the burden of proof, which continues to rest with the petitioner.

§ 134.408 Decision on appeal.

(a) A decision of the Administrative Law Judge under this subpart is the final agency decision, and is binding on the parties.

(b) The Administrative Law Judge shall issue a decision, insofar as practicable, within 90 days after an appeal petition is filed. If the Administrative Law Judge does not issue a decision within 90 days after an appeal petition is filed, he or she must indicate the reason that the 90-day time limit has not been met in the decision, when issued.

(c) The Administrative Law Judge may reconsider an appeal decision within 20 days of the decision if there is a clear showing of an error of fact or law material to the decision.

Subpart E—Implementation of the Equal Access to Justice Act

SOURCE: 61 FR 2683, Jan. 29, 1996. Redesignated at 63 FR 35766, June 30, 1998.

§ 134.501 What is the purpose of this subpart?

The Equal Access to Justice Act, 5 U.S.C. 504, establishes procedures by which prevailing parties in certain administrative proceedings may apply for reimbursement of fees and other expenses. Eligible parties may receive awards when they prevail over SBA, unless SBA's position in the proceeding was "substantially justified" or, as provided in §134.405(b), special circumstances make an award unjust. The